Office - Supreme Court, U.S.
FILED
JUL 29 1957
JOHN T. FEY, Clerk

No. 163

In the Supreme Court of the United States

OCTOBER TERM, 1957

JAMES D. RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
JOSEPH M. HOWARD,
JOHN J. McGARVEY,
Attorneys,
Department of Justice,
Washington 25, D. C.

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Rule involved	2
Statement	3
Argument	8
Conclusion	12

CITATIONS

Cases:

Cheng Wai v. United States, 125 F. 2d 915	9
Hoffritz v. United States, 240 F. 2d 109	9
Montgomery v. United States, 203 F. 2d 887	10
Turner v. United States, 222 F. 2d 926, certiorari denied, 350 U. S. 831	10
United States v. Achilli, 234 2d 797	10
United States v. Burdick, 214 F. 2d 768	10
United States v. Gross, 137 F. Supp. 244	9
Zacker v. United States, 227 F. 2d 219, certiorari denied, 350 U. S. 993	10

Statute:

Internal Revenue Code of 1939:	
Sec. 145(b)	4
Sec. 3793(b)	4

Miscellaneous:

Federal Rules of Civil Procedure, Rule 26	4
Federal Rules of Criminal Procedure, Rule 41	2
IR-MIM. 58, 1952-2 Cum. Bull. 297, 298	11

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 163

JAMES D. RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 42a-47a) is reported at 19 F. R. D. 278. The opinion of the Court of Appeals (Pet. App. 27-31) is reported at 241 F. 2d 285.

JURISDICTION

The opinion of the Court of Appeals was entered on February 8, 1957 (Pet. App. 27), and a petition for rehearing was denied on March 8, 1957 (Pet. App. 32). The petition for certiorari was filed on June 3, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

Whether the District Court erred in denying, on the basis of affidavits and oral argument, petitioner's motion made prior to indictment for the return and the suppression as evidence of records allegedly obtained illegally by Treasury agents in the course of an income tax investigation.

RULE INVOLVED

Federal Rules of Criminal Procedure:

RULE 41. SEARCH AND SEIZURE

* * * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or

trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

On February 16, 1956, prior to indictment, petitioner moved the United States District Court for the Eastern District of New York, under Rule 41(e), Federal Rules of Criminal Procedure, for an order suppressing as evidence, directing the return of, and restraining the Government from presenting to a grand jury, statements and records allegedly obtained illegally by Treasury agents in the course of an investigation of his income tax liability. He requested a hearing for the purpose of taking testimony on issues of fact raised by the motion. (R. 2a-4a.) The motion, as amplified by the petitioner's accompanying affidavit (R. 5a-17a), alleged in substance that the agents obtained the evidence by fraud and trick in that petitioner was never advised that the investigation might lead to criminal prosecution but to the contrary was given to understand that the object of the investigation was to ascertain his correct civil tax liability; and that the evidence was further tainted with illegality in that neither the attorney nor the accountant who represented petitioner at various stages of the investigation was enrolled to practice before the Treasury Department which fact was known to the agents who, nevertheless, used the accountant as their (R. 12a) "willing tool * * * for the transmission of evidence * * * needed

by them in the preparation of the criminal charge * * *." In reply the Government filed the affidavits of the two Treasury agents who made the investigation and obtained the evidence in question (R. 19a-26a). After hearing argument on the motion, the court granted petitioner time in which to file a supplemental affidavit (R. 36a-41a) and the affidavit of his former attorney, Frank D. Paulo (R. 33a-35a).[1] Prior to a decision on the motion, an indictment was returned against petitioner, in the same court, charging violations of the revenue laws.[2] On June 27, 1956, the District Court, on the basis of the affidavits and oral argument, entered its findings and opinion denying the motion. (R. 42a-47a.)

The District Court's findings may be summarized, briefly, as follows:

Petitioner is employed as an assistant clerk in the office of the Clerk of Richmond County, New York. In addition, he has conducted an insurance brokerage business and has prepared income tax returns for other persons. (R. 42a-43a.)

---

[1] On February 27, 1956, while the motion to suppress was pending, petitioner filed an application under Rule 26, Federal Rules of Civil Procedure, accompanied by an affidavit of his present counsel, Boris Kostelanetz, for leave to take the deposition, prior to the expiration of 20 days after the commencement of this proceeding, of one William Mack, who was petitioner's accountant during the period in question and who allegedly had knowledge of facts material to a decision on the motion to suppress (R. 30a-32a).

[2] The indictment charges that petitioner wilfully attempted to evade his income tax for the years 1949, 1950 and 1951, and that he wilfully aided and assisted in the preparation and filing of false and fraudulent income tax returns for others, in violation of Sections 145(b) and 3793(b), respectively, of the Internal Revenue Code of 1939.

On June 26, 1952, petitioner was interviewed (in the library of the Richmond County Court House) by Special Agent Skolnick, Intelligence Unit, Internal Revenue Service, who had under investigation a number of income tax returns prepared by petitioner for others. In the course of the interview, petitioner described his insurance business generally and gave the agent the names of some of the companies for which he solicited business. He also promised to submit to the agent the names of the persons whose income tax returns he prepared. Shortly thereafter, petitioner delivered this information to Skolnick, at which time he also gave Skolnick the names of two banks in which he had checking accounts. (R. 43a.)

In September 1952, petitioner's tax returns, as well as tax returns which he had prepared for others, were assigned to Revenue Agent Foley for investigation (R. 44a).

In February 1953, Frank D. Paulo, an attorney, telephoned Skolnick and stated that he had been retained to represent petitioner.[3] In May 1953, petitioner telephoned Skolnick and suggested that the latter contact Paulo with respect to arranging an interview. This the agent did. (R. 43a-44a.)

On May 19, 1953, petitioner appeared at the office of the Intelligence Unit, Internal Revenue Service, accompanied by his attorney, Paulo. After petitioner consented to make a statement under oath and after he was advised that he had a right to decline to answer

---

[3] Although not included in the court's findings, it is undisputed that at the request of Revenue Agent Foley, Paulo, in February 1953, secured from petitioner and submitted to the agents a waiver extending the period of limitations with respect to petitioner's return for 1949 (R. 19a-20a, 34a-35a, 37a).

any question which might tend to incriminate him, he was questioned in the company of his attorney by Skolnick.[3] A number of the questions asked by Skolnick related to petitioner's income and to the nature and extent of his insurance brokerage business during the years 1949 through 1951. In this connection, petitioner, among other things, gave Skolnick the names of seven insurance companies with which he did business. The interview was recorded by a stenographer and transcribed. On July 2, 1953, petitioner, again accompanied by his attorney, Paulo, returned to Skolnick's office and after reading the transcribed statement, consisting of some twenty-two pages, he initialed each page, again swore to the truth of the statement and signed it. A copy of the statement was given to petitioner. (R. 44a.)

Shortly after the interview in May 1953, Revenue Agent Foley contacted Paulo and requested to see petitioner's books and records. He was advised by Paulo that William Mack, an accountant, had been engaged by petitioner to assemble and review his records for the years in question and that Mack would communicate with the agent when the records were assembled. Mack had performed Paulo's personal accounting work for many years; he also did accounting work for a number of Paulo's clients. After repeated requests of Paulo and Mack, the agents obtained petitioner's records from Mack in October 1953; Mack also turned over to the agents the work sheets which he had prepared from the records.[4] (R. 44a-45a.)

---

[4] Although not spelled out in the court's findings, it is undisputed that the records in question consisted of bank statements, cancelled checks and check book stubs (R. 6a, 20a).

In December 1954, petitioner, accompanied by Mack, was again interviewed by Skolnick in the latter's office. On this occasion, petitioner declined to give a sworn statement but agreed to answer questions. At the outset of this interview, he was again advised that he need not answer any question which might tend to incriminate him. (R. 45a.)

The District Court noted (R. 45a) that petitioner's motion to suppress was grounded "chiefly, if not entirely, on the fact that Mack, the accountant designated by petitioner, and his then counsel, Mr. Paulo, were not admitted to practice before the United States Treasury Department, hence, were not qualified to represent him in the investigation then being conducted, and therefore, that all of the proceedings had therein were tainted with illegality." The court held that the fact that petitioner's representatives were not admitted to practice before the Treasury Department was not pertinent to the issues presented by the motion to suppress.

The District Court further stated that the critical inquiry is whether the taxpayer freely consented to the disclosures and that it is not essential to the admissibility of statements secured by government officials that the taxpayer be first warned that the information might be used against him in a criminal case "provided that it was voluntarily and understandingly given" (R. 46a). Applying these criteria to the facts disclosed by the affidavits, the District Court concluded (R. 46a): "It is my opinion that the petitioner freely and voluntarily gave the information in question to Skolnick and Foley. He was represented by counsel

at the time that many of the voluntary disclosures were made, a number of them before Mack came into the case. I am satisfied also that the information supplied by Mack was given with the consent, if not by the direction of the petitioner. His claim that, since Mack was not admitted to practice before the Treasury Department, he did not have the authority to appear and act in his behalf, is, in my opinion, merely an expedient."

The Court of Appeals affirmed (Pet. App. 27-31), observing that: "Not only was there no evidence of any affirmative act of deception by Skolnick or Foley, but the record shows sufficient awareness by Russo that he was himself under investigation and of course this would include the possibility of criminal sanctions." (Pet. App. 30)

The Court of Appeals therefore held that: "Since the voluntary nature of the disclosure is so clear from those portions of the affidavits which are undisputed, the district judge quite properly declined to take any further evidence at a hearing." (Pet. App. 31)

ARGUMENT

1. There is no merit in petitioner's contention (Pet. 8-13) that the District Court erred in denying his motion to suppress without hearing testimony for, contrary to petitioner's assertions (Pet. 8-10), the affidavits on file with the court did not raise any issue of fact essential to a decision on the motion. Stripped of petitioner's many conclusory allegations, the affidavits disclose as uncontroverted facts that petitioner's first contact with any Treasury agent took place in June 1952, when he was interviewed by Special Agent Skolnick (R. 5a, 22a); that in July 1952, petitioner brought to the office of the Intelligence Unit information re-

quested by Skolnick, including the names of banks in which he had checking accounts (R. 23a); that in February 1953 Revenue Agent Foley secured through petitioner's attorney a waiver extending the period of limitations with respect to petitioner's return for 1949 (R. 19a-20a, 34a-35a); and that in May 1953, petitioner was questioned under oath by Skolnick in the office of the Intelligence Unit, at which interview he was represented by counsel and answered questions relating to his income and tax liability (R. 6a, 23a-25a, 33a, 39a-40a). Further, that following the interview of May 1953, petitioner engaged an accountant to assist him in connection with the investigation of his returns (6a, 33a-34a); that requests by the agents to examine petitioner's records were made through his attorney who referred the agents to the accountant (R. 20a, 35a); and that in the fall of 1953, the accountant submitted to the agents his work sheets and the petitioner's records (R. 20a) with the knowledge and consent of petitioner (R. 7a). In short, as the court below noted (Pet. App. 31), the voluntary nature of the disclosure by petitioner, and the absence of any conduct on the part of the investigating agents even suggestive of fraud or misrepresentation, was apparent from the undisputed portions of the affidavits; consequently, there was no need for the trial court to take testimony or receive depositions. See *Cheng Wai* v. *United States*, 125 F. 2d 915 (C.A. 2d); *United States* v. *Gross*, 137 F. Supp. 244 (S. D. N. Y.).

Petitioner's reliance upon *Hoffritz* v. *United States*, 240 F. 2d 109 (C. A. 9th), is misplaced. In the *Hoffritz* case a hearing was necessary because there "was at least one issue of fact necessary to the decision of the motion." (240 F. 2d at 112.)

Petitioner's charge (Pet. 20-25) that the agents obtained the evidence in question through fraud, deceit and misrepresentation, in that they conducted a "joint fraud investigation in the deceptive guise of a routine audit" (Pet. 25) is effectively refuted by the uncontroverted facts. As the Court of Appeals held, "Not only was there no evidence of any affirmative act of deception by [the government agents], but the record shows sufficient awareness by Russo that he was himself under investigation and of course this would include the possibility of criminal sanctions." (Pet. App. 30.) In the light of this record, petitioner's protestations (Pet. 9, 23) that he was unaware of the "true identity or purpose of [the Special Agent] until virtually years later," and that he was led by the agents to believe that they were conducting a routine civil audit, are without foundation. If the thrust of petitioner's argument is that he had a right to be advised by the agents at the outset of the investigation that criminal charges might result and that any information he gave might be used against him, the answer is that there is no such requirement of law. *United States* v. *Achilli*, 234 F. 2d 797, 805 (C. A. 7th); *Turner* v. *United States*, 222 F. 2d 926 (C. A. 4th), certiorari denied, 350 U. S. 831; *United States* v. *Burdick*, 214 F. 2d 768 (C.A. 3d); *Montgomery* v. *United States*, 203 F. 2d 887 (C.A. 5th); *Zacher* v. *United States*, 227 F. 2d 219 (C.A. 8th), certiorari denied, 350 U.S. 993.

2. Petitioner's argument (Pet. 13-20) that the evidence was obtained illegally since neither the attorney (Pet. 9) nor the accountant who represented him during the investigation was enrolled to practice before the Treasury Department is, as both courts below

pointed out (R. 45a, Pet. App. 30), not pertinent to the issue and wholly without merit. We doubt that petitioner seriously urges upon this Court that he was not adequately represented by counsel because his former attorney, whose competence is not otherwise challenged, failed to observe the formality of obtaining a Treasury card. With respect to the accountant, who petitioner agrees (Pet. 3, 14) was engaged to assist him in the course of the investigation, suffice it to note that IR-MIM. 58, 1952-2 Cum. Bull. 297, 298, provides in pertinent part as follows:

> Thus, during the field examination process a taxpayer has the right to use the services of any person he may elect, whether or not enrolled, for the purpose of explaining his books, records, or returns to the examining agent; and the examining agent, in the factual development of a case, has not only the right but also the duty to receive information from anyone, whether or not enrolled and irrespective of the presence of the taxpayer, who has knowledge of facts pertinent to the case.
>
> 3. The foregoing pertains primarily to the furnishing of information during the factual development stage of a case. However, the taxpayer also has the right, in those cases where issues or controversies have resulted from the factual development of such cases, to have any unenrolled person who has knowledge of pertinent facts accompany him or his duly enrolled and authorized representative to conferences, but such unenrolled person may appear at such conferences only when the taxpayer or his duly enrolled and authorized representative

is present in person, and then only in the capacity of a witness.

CONCLUSION

For the reasons stated, it is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN J. MCGARVEY,
Attorneys.

JULY 1957.